# CIVIL LAW UPDATE

by Justice Paul Turner
(3/24/2004)

## NEW COURT RULES AND LEGISLATION

**California Rules of Court, rule 209**

Replaces time disposition goals.

The disposition goals for *unlimited* civil cases are: 75 per cent in 1 year; 85 per cent in 18 months; and 100 per cent in 24 months.

The disposition goals for *limited* civil cases are: 90 per cent in 1 year; 98 per cent in 18 months; and 100 per cent in 24 months.

The case disposition goal for exempt cases, complex matters, is now 3 years.

Expedited case disposition standards can be adopted by local rule which allow for resolution of "appropriate cases" (collection matters) in six to nine months.

**California Rules of Court, rule 212(j)**

Sets forth 25 factors to be considered in setting a trial date.

**California Rules of Court, rule 224**

Imposes the duty on parties to notify the court and other litigants of a stay issued by any court.

**California Rules of Court, rules 375-375.1**

Replaces section 9 of the Standards of Judicial Administration which has been repealed.

Retains the rule that continuance motions are disfavored.

Sets forth the grounds for denying or granting a continuance motion.

Makes two modifications to former section 9 of the Standards of Judicial Administration—allows the parties to stipulate to continuances of trial dates or to seek a delay ex parte.

**California Rules of Court, rule 1600 et seq.**

Court rules concerning judicial arbitration redrafted.

California Rules of Court, rule 1605(d) through (e) provides a method for replacing arbitrators.

**Civil Code sections 1942.4-1942.5**

Expands the scope of the prohibition against a lessor from increasing rent or serving a three day notice to pay rent or quit if the premises are *uninhabitable*.

Expands the scope of unsafe conditions a tenant may assert against a lessor as a defense in an unlawful detainer action.

**Civil Code section 1954**

Specifies the circumstances under which a tenant may orally agree to allow the lessor to enter the premises to make "agreed to repairs or supply agreed to services."

No written notice of entry under Civil Code section 1954, subdivision (d) is necessary if there is an emergency, the tenant is present and consents to entry, or the premises have been abandoned or surrendered.

**Civil Code section 1632**

Requires under specified circumstances that contracts be provided in Chinese, Tagalog, Vietnamese, or Korean to consumers.

**Code of Civil Procedure section 209**

As an alternative to contempt, a person who refuses to respond to a juror summons may be subject to a monetary sanction after notice and an opportunity to be heard.

**Code of Civil Procedure section 340.8**

Adopts a two year statute of limitations for "exposure to a hazardous material or toxic substance."

Also adopts a delayed discovery statute of limitations—"two years after the plaintiff becomes aware of, or reasonably should have become aware of, (1) an injury, (2) the physical cause of the injury, and (3) sufficient facts to put a reasonable person on inquiry notice that the injury was caused or contributed to by the wrongful act of another, whichever occurs later."

Codifies the holdings in: *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1107; *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397-398; and *Clark v. Baxter HealthCare*

*Corp.* (2000) 83 Cal.App.4th 1048, 1055. Disapproves of the holding in *McKelvey v. Boeing North American, Inc.* (1999) 74 Cal.App.4th 151, 160-162.

**Code of Civil Procedure section 425.17**

Excludes certain cases from the scope of a Code of Civil Procedure section 425.16 special motion to strike.

**Code of Civil Procedure section 1161.2**

If a defendant prevails in a limited jurisdiction unlawful detainer action within 60 days after it is filed, the clerk may not reveal the court file and the register of actions to any member of the public.

**Code of Civil Procedure section 1166**

Effective January 1, 2005, increases the pleading requirements for an unlawful detainer complaint.

But due to a drafting oversight, Code of Civil Procedure section 1166 has been repealed until January 1, 2005, which means currently there is no verification requirement.

**Code of Civil Procedure sections 2031.1-2031.2**

Confidential settlement agreements in Elder Abuse and Adult Dependent Civil Protection Act cases are disfavored. Such secrecy agreements are unenforceable under specified circumstances.

A stipulated confidentiality agreement does not extend to evidence of elder abuse. Information subject to a protective order that is not evidence of elder abuse shall remain under seal 30 days after filing.

**Evidence Code section 956.5**

Creates an exception to the lawyer client privilege when the attorney reasonably believes disclosure is "necessary" to prevent a criminal act likely to result in death or substantial bodily harm.

**Financial Code section 4050**

Enacts the California Financial Information Privacy Act and provides for civil penalties recoverable in a suit brought in the name of the People of the State of California by state agencies.

**Government Code section 8315**

Defines "racial discrimination" and "discrimination on the basis of race" in article I, section 31 of the California Constitution by reference to the International Convention on the Elimination of All Forms of Racial Discrimination.

Article I, section 31 of the California Constitution, except as to its prohibition against granting racial preference, does not provide a private cause of action.

**Government Code section 68115**

The presiding judge of a superior court may request that the Chief Justice declare an emergency due to "war, insurrection, pestilence, or other public calamity" and extend the time to file papers in a civil matter.

**Labor Code section 1102.5**

Prohibits retaliation against an employee for refusing to violate a state or federal law or exercising whistle-blower rights with a prior employer.

Provides for civil penalties for a violation of Labor Code section 1102.5 employee rights.

**Labor Code section 2698 et seq.**

Adopts the Labor Code Private Attorneys General Act of 2004.

Permits an aggrieved employee to pursue an individual or class action claim to impose penalties recoverable under the Labor Code.

Permits the aggrieved employee's lawyer to recover attorney fees.

**68 Federal Register 57496**

Effective October 3, 2003, the Securities and Exchange Commission has adopted as a rule and extended for a third six-month period the National Association of Securities Dealers rule IM-10100(f) and (g) which requires claimants to waive the application of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

## DECISIONAL UPDATE

### Lessor-tenant Disputes

*Drouet v. Superior Court* (2003) 31 Cal.4th 583

A lessor has the right under the Ellis Act to withdraw rental property from the market and use it for other purposes.

If a tenant asserts a Civil Code section 1942.5 retaliatory eviction defense, the lessor may nonetheless prevail by proving a bona fide intent to withdraw property from the rental market pursuant to the Ellis Act.

### Employment

*General Dynamics Land Systems, Inc. v. Cline* (2004) 540 U.S. __

An employer adopted a rule which favored employees aged 50 and above over co-employees who were more than 40 years old.

The Supreme Court rejected the over 40 and under 50 year old employees' claims under the Age Discrimination in Employment Act of 1967.

The Supreme Court held that the Age Discrimination in Employment Act of 1967 only protects older employees from discriminatory acts which favor younger workers.

*Raytheon Company v. Hernandez* (2003) 540 U.S. __

Plaintiff resigned in lieu being discharged when he failed a drug test. Failing a drug test was a violation of the employer's workplace rules. Plaintiff's request to be reemployed nearly two and one-half years later was denied because he previously had been discharged for violating workplace rules. Plaintiff sought relief under the Americans with Disabilities Act. The Ninth Circuit held that the no rehire policy was unlawful as applied to former drug addicts and hence a violation of the Americans with Disabilities Act. The Ninth Circuit held defendant's no rehire policy created an unlawful disparate treatment of recovering drug addicts.

The Supreme Court held there were two relevant disparate effect claims under the Americans with Disabilities Act. First, an aggrieved employee can pursue a *disparate treatment* claim under the Americans with Disabilities Act. A disparate treatment claim arises when a plaintiff claims to have been on treated less favorably because of a disability. Liability under a disparate treatment theory requires that the adverse employment decision be motivated by a intention to treat a person less favorably because of a disability. Second, an employee can pursue a *disparate impact* claim. A disparate impact claim requires a showing that a neutral employment practice treats a group more harshly, in this case recovering drug addicts, and cannot be justified by a business necessity. No intent to discriminate requirement exists for this second type of adverse treatment claim under the Americans with Disabilities Act. No disparate impact theory, the second form of discriminatory treatment claim, was at issue in this case.

The Supreme Court held that the employer's neutral nondiscriminatory reason not to rehire plaintiff, his violation of company rules, was sufficient to negate plaintiff's disparate treatment claim. As noted previously, a disparate claim requires an intent to discriminate. Since plaintiff's prior violation of workplace rules was the basis of the decision not to rehire, there was no intent to discriminate and hence no liability under the Americans with Disabilities Act.

*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026

In a suit brought pursuant title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.), the decisions of *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 765 and *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 807, hold a *complete* defense to a hostile environment sexual harassment claim is established if the employee failed to use an employer's corrective processes to otherwise avoid harm (the so-called *Burlington-Faragher* defense).

Under the Fair Employment and Housing Act, the *Burlington-Faragher* defense is inapplicable. Rather, the employer is strictly liable for all acts of sexual harassment by a supervisor.

However, the Supreme Court held the avoidable consequences doctrine may be asserted by the employer as a defense to reduce the *amount of damages*. That defense is this context requires the following: "(1) the employer took reasonable steps to prevent and correct workplace sexual harassment; (2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided; and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered."

The Supreme Court emphasized that the avoidable consequences doctrine is not a complete defense to a sexual harassment claim but only serves to reduce the amount of recoverable damages.

**Arbitration**

*Citizens Bank v. Alafabco, Inc.* (2003) 539 U.S. __

Title 9 United States Code section 2, which is part of the United States Arbitration Act, requires enforcement of an arbitration clause contained in a contract "evidencing a transaction involving commerce."

The Alabama Supreme Court held that the language "evidencing a transaction involving commerce" required that the contract have a "substantial" effect on interstate commerce in order for the arbitration clause to be enforceable under the United States Arbitration Act.

The United States Supreme Court disagreed. The United States Supreme Court held there was no requirement that the contract have any specific effect on interstate commerce. Rather, the test was whether the aggregate economic activity represents a "general practice" subject to federal control. The Supreme Court concluded that the debt

restructuring agreement at issue when coupled with the interstate nature of the borrower "evidenc[ed] a transaction involving commerce" and was hence subject to the limited preemptive effect of the United States Arbitration Act.

*Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. __

An agreement to have an arbitrator decide "[a]ll disputes, claims, or controversies" arising from a contractual relationship requires that the arbitrator decide if a contract permits class-wide arbitration.

In *Garcia v. DIRECTTV, Inc.* (2004) 115 Cal.App.4th 297, 299-304, the Court of Appeal applied *Bazzle* to a class action dispute. The Court of Appeal held that the limited preemptive effect of the United States Arbitration Act extended to require an arbitrator to decide whether an arbitration clause permitted class-wide arbitrations.

*Saint Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1183

The Supreme Court disapproved the holding in *Bertero v. Superior Court* (1963) 216 Cal.App.2d 213, 221-222 which held that contending a contract was unenforceable barred a party from asserting its rights to arbitrate under an arbitration clause in the agreement.

*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064

The unconscionability requirements of *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 103-113 apply to a nonstatutory wrongful termination claim filed pursuant to *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 178 (termination in violation of fundamental public policy).

A provision of an arbitration clause which allows the employer only to appeal from an award is unconscionable within the meaning of *Armendariz*. But the one-sided appeal provision was severable.

The silence of the arbitration clause concerning sharing of costs is not a ground for refusing to enforce the agreement.

The decision of the United States Supreme Court in *Green Tree Financial Corp.-Ala. v. Randolph* (2000) 531 U.S. 79, 90-91 does not require cost-sharing in a case involving statutory claims. *Green Tree Financial* held that the alleged inability of the claimant to pay the arbitration costs, which was not supported by any evidence, was not a basis to invalidate the arbitration agreement.

*Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303

The Supreme Court reiterated that its prior holding in *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1081-1084 applied to injunctive relief claims brought pursuant to the Consumers Legal Remedies Act (Civ. Code, § 1780)

notwithstanding the decisions of *Green Tree Financial Corp.-Alabama v. Randolph* (2000) 531 U.S. 79, 92 and *Circuit City Stores, Inc. v. Adams* (2001) 532 U.S. 105, 122.

For the first time, the Supreme Court held that injunctions sought under the unfair competition law (Bus. & Prof. Code, § 17200 et seq.) and arising out of false advertising claims (Bus. & Prof. Code, § 17500 et seq.) are exempt from the limited preemptive effect of United States Arbitration Act. (9 U.S.C. § 2.)

But plaintiff's unfair competition law restitution and disgorgement claims are preempted by the United States Arbitration Act and must be arbitrated.

In the normal case, proceedings on the non-arbitrable claims are to be stayed pending the completion of the arbitration proceedings.

**Unfair Competition and Class Actions**

*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798

In a class action, plaintiff argued that the defendants, Medicaid providers, unlawfully pursued excessive lien claims against Medicaid beneficiaries. Plaintiff asserted causes of action for violation of the unfair competition law (Bus. & Prof. Code, § 17200), trespass, negligent misrepresentation, and fraud.

Welfare and Institutions Code section 14124.791 is preempted by federal law insofar as it allows a Medicaid provider to recover from a beneficiary pursuant to a lien an amount exceeding the Medicaid payment actually made.

Welfare and Institutions Code section 14124.791, even though it is preempted by federal law, provides a safe harbor from liability under a Business and Professions Code section 17200 unfair competition claim. (See *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 182.)

Plaintiff's trespass, negligent misrepresentation, and fraud claims premised on the Medicaid provider's assertion of the right to collect those liens was barred by the Civil Code section 47, subdivision (b) litigation privilege.

**Torts**

*Mulder v. Pilot Air Freight* (2004) 32 Cal.4th 34

A report by an employee of the defendant that the plaintiff has stolen a flight recorder was absolutely privileged pursuant to Civil Code section 47, subdivision (b). *Mulder* was a companion case of *Hagberg v. California Federal Bank* (2004) 32 Cal.4th 34 which reached the same conclusion.

*Mulder* and *Hagberg* disapproved of several cases which suggested the Civil Code section 47, subdivision (b) immunity was subject to good faith limitation.

*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336

In order for an underlying action to serve as a basis for a subsequent malicious prosecution action, it is necessary that the first suit be resolved on the merits. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 871; *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50.)

In this case, the underlying suit was resolved based on the basis of the parol evidence rule. The Supreme Court concluded, "[A] termination based on the parol evidence rule constitutes a favorable termination for malicious prosecution purposes."

In so ruling, the Supreme Court overruled *Hall v. Harker* (1999) 69 Cal.App.4th 836, 845.

*Shively v. Bozanich* (2003) 31 Cal.4th 1230

The Supreme Court held that the statute of limitations for libel commences to run upon the first general distribution to the public of the defamatory publication.

The court refused to adopt a delayed-discovery rule. However, a defendant can be estopped from relying on the statute of limitations as in *Bernson v. Browning-Ferris Industries of California, Inc.* (1994) 7 Cal.4th 926, 931-932 where the defendant denied it made the defamatory statements.

*Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175

A public entity providing a emergency telephone services is immune from civil liability unless the dispatcher or other employees acted in bad faith or in a grossly negligent manner. (Health & Saf. Code, § 1799.107.)

The Supreme Court held that the public entity is not directly liable for the negligent providing of 911 call service.

As to public entity vicarious liability because of an employee's negligent act or omission as permitted by Government Code section 815.2, subdivision (a), the Supreme Court declined to resolve the issue. Instead, the court held the employees' conduct in this case did not rise to the level of bad faith or gross negligence.

The court disapproved of the holding in *Ma v. City and County of San Francisco* (2002) 95 Cal.App.4th 488, 511-520 which held there was duty imposed on a public entity providing emergency telephone services pursuant to Civil Code section 1714 and the Health and Safety Code section 1799.107 immunity did not apply to 911 dispatching.

*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990

The doctrine of primary assumption of risk does not preclude liability against a school district and swim team coach for an injury sustained by a student who was injured diving in the shallow end of a pool.

*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342

Defendant, a former employee of plaintiff, Intel Corporation, sent e-mail messages to between 8,000 and 35,000 employees on six specific occasions over a two-year period. The e-mail messages did not interfere with Intel's e-mail system and defendant offered to remove any recipient from his list if they wished not to receive his e-mails.

The Supreme Court held that defendant's e-mails did not constitute the tort of trespass to chattels because his conduct: caused neither physical damage nor functional disruption to the company's computers; did not interfere with the use of the computer system; nor interfered with any legally protected use of the property.

*Viner v. Sweet* (2003) 30 Cal.4th 1232

Defendant, a Washington, D.C. lawyer who was unfamiliar with California law, negotiated a buyout agreement for a publisher. Plaintiff contended that defendant committed seven acts of malpractice including failing to provide proper advice concerning, among other things, California law relating to noncompetition, attorney fees, and indemnity clauses in the buyout agreement.

The Supreme Court established the causation test for malpractice occurring in the performance of transactional work which it defined as "giving advice or preparing documents for a business transaction."

The Supreme Court adopted the "but for" test for causation in Restatement Second of Torts, section 432 for transactional legal malpractice which states, "Except as stated in Subsection (2), the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent."

The Supreme Court noted that in this case, plaintiffs were not contending there were concurrent independent causes of their losses, the exception to the "but for" test in the Restatement Second of Torts section 432.

The crucial question in a transactional malpractice case is what would have happened if the defendant who provided negligent advice in connection with the transaction had not been negligent.

*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037

In a legal malpractice action, two former clients could not recover, as a compensatory award, punitive damages not recovered in an underlying class action.

The Supreme Court relied on its prior decision in *PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 315-318 and held that public policy considerations strongly militate against allowing a plaintiff to recover lost punitive damages as compensatory damages in a legal malpractice action.

*Hassan v. Mercy American River Hosp.* (2003) 31 Cal.4th 709

A hospital can assert a Civil Code section 43.8 defense (communication to medical care institutions concerning practitioners of the healing or veterinary arts) in a defamation action.

The Civil Code section 43.8 privilege is qualified and inapplicable if the information conveyed is known to be false or transmitted in bad faith.

*Teter v. City of Newport Beach* (2003) 30 Cal.4th 446

A public entity is immune from civil liability pursuant to Government Code section 844.6, subdivision (a)(2) when a prisoner in a city jail, who has been arrested on public intoxication charges (Pen. Code, § 647, subd. (f)), is beaten by another inmate.

*Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139

The plaintiff was injured crossing a street, owned by the county, when she was struck by the driver of a car, walking to the defendant's bus stop.

The Supreme Court held that the negligence of the county in maintaining the street and the driver of the car that struck the plaintiff did not foreclose the jury from finding the defendant, a transit district, negligently located its bus stop; thereby constituting a dangerous condition within the meaning of Government Code section 835.

*Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070

An insurance policy case defined structural "collapse" as "actually fallen down or fallen to pieces." However, the Court of Appeal and the trial court concluded, sound public policy requires coverage for imminent, as well as actual, collapse; otherwise dangerous conditions would go uncorrected.

The Supreme Court held the definition of collapse in the policy was unambiguous and public policy considerations could not be used to alter the contractual language.

**CIVIL PROCEDURE**

*Jarrow Formulas v. LaMarche* (2003) 31 Cal.4th 728

A Civil Procedure section 425.16 special motion to strike can be filed against a malicious prosecution claim.

*Palmer v. GTE California, Inc.* (2003) 30 Cal.4th 1265

A party intending to move for a new trial or judgment notwithstanding the verdict must do so within 15 days of receiving notice of the entry of the judgment. (Code Civ. Proc., §§ 629, 659.)

Defendant served a judgment notwithstanding the verdict motion and notice of intention to move for a new trial 26 days after receiving a photocopy of the file-stamped and dated judgment.

The trial court granted the new trial motion.

The trial court's order granting the new trial motion was void because the motion was filed more than 15 days after service by mail of the photocopy of the file-stamped judgment. The Supreme Court held it was unnecessary the notice of the judgment contain the words "notice of entry."

**Probate**

*In re Estate of Ford* (2004) 32 Cal.4th 160

Terrold Bean claimed the right to inherit from the estate of Arthur Patrick Ford, who died intestate. Mr. Bean claimed he was entitled to inherit because he was Mr. Ford's equitably adopted son.

Equitable adoption requires: some form of agreement to adopt; subsequent objective conduct indicating mutual recognition of an adoptive parent and child relationship; these facts must exist to such an extent that in equity and good conscience an adoption should be deemed to have taken place; and there is proof of an intent to adopt.

The law of equitable adoption, a contract based theory, does not recognize an estoppel arising merely from the existence of a familial relationship between the decedent and a claimant.

The intent to adopt must be proven by clear and convincing evidence.

**First Amendment**

*Locke v. Davey* (2003) 540 U.S. __

The Constitution of the State of Washington provides, "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." (Wash. Const, art. I, § 11.) Plaintiff was a theology student and was denied a state funded Promise Scholarship.

The Supreme Court held that the Washington State Constitution and certain enabling legislation which denied a Promise Scholarship to plaintiff, because he was a theology major, did not violate the Free Exercise Clause.

The Supreme Court also distinguished the present case from *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995) 515 U.S. 819, 830-846. In *Rosenberger*, the Supreme Court invalidated an university policy prohibiting the use of public funds by school religious groups. The Supreme Court explained in *Rosenberger* that the taxpayer funded program which allowed for the use of university facilities was in essence a publicly funded forum for diverse ideas. Hence, the university refusal to allow sectarian groups to use school facilities was an unconstitutional regulation of speech. In *Locke*, the

Supreme Court held that the Promise Scholarships were neither a program designed to "encourage a diversity of views from private speakers" nor a speech forum.

*DVD Copy Control Assn. Inc. v. Bunner* (2003) 31 Cal.4th 864

Plaintiff sought to enjoin defendant from posting on the internet a trade secret, a computer program which decrypted movies stored on DVDs.

Citing *Madsen v. Women's Health Center Inc.* (1994) 512 U.S. 753, 762-764, the Supreme Court held that the injunction was content neutral and was examined under a intermediate level of First Amendment scrutiny.

Under that test the injunction was reviewed for "whether the challenged provisions of the injunction burden[s] no more speech than necessary to serve a significant government interest." Further, the *Madsen* test required a balancing of the magnitude of the restriction on speech with the governmental interest (the need for trade secrets which are a property interest). Finally, the *Madsen* test requires that any restriction on speech burden free expression no more than necessary to serve the governmental interest.

Under the *Madsen* test, the injunction in this case was constitutionally valid.

*Winter v. DC Comics* (2003) 30 Cal.4th 881

Plaintiffs, Johnny and Edgar Winter, filed suit for violation of their Civil Code section 3344 rights against the alleged unlawful use of their likenesses in a comic book.

The drawings in the comic book were not "mere likenesses" and contained significant expressive content.

Hence, the comic books were entitled to First Amendment protection.

The Supreme Court contrasted the likenesses in this case with those of the Three Stooges in *Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 396 which were not subject to First Amendment protection.

**PENDING CALIFORNIA SUPREME COURT CASES**

*Jevne v. Superior Court*, Supreme Court case No. S121532

The court will decide the effect of the refusal of the National Association of Securities Dealers to schedule arbitrations unless claimants waive the application of this state's arbitrator ethics rules or agree to have proceedings conducted outside California.

*Varian Medical Systems, Inc. v. Delfino*, Supreme Court case No. S121400

The Supreme Court press release states the issue before the court is, "Does an appeal from the denial of a special motion to strike under the anti-SLAPP statute (Code Civ. Proc., § 425.16) effect an automatic stay of the trial court proceedings?"

*Cronus Investments, Inc. v. Concierge Service, LLC*, Supreme Court case No. S116288

The Supreme Court will determine whether a trial court stay of an arbitration pending the outcome of related litigation pursuant to Code of Civil Procedure section 1281.2, subdivision (c) violates the United States Arbitration Act. (9 U.S.C. § 1 et seq.)

*Avila v. Citrus Community College Dist*., Supreme Court case No. S119575

The Supreme Court will decide whether a community college district is liable for injuries during a pre-season intercollegiate baseball game and the effect of the Government Code section 831.7 immunity.

*Graham v. DaimlerChrysler Corp.*, Supreme Court case No. S112862

The court will decide whether to reconsider if California's private Attorney General should permit the recovery of fees when an unsuccessful lawsuit nonetheless is a "catalyst" inducing a party to change its behavior.

*Gomez v. Superior Court*, Supreme Court case No. S118489

The court will decide whether the operator of an amusement ride is a Civil Code section 2168 common carrier.

*Morris v. De La Torre*, Supreme Court case No. S119750

The December 8, 2003, Supreme Court press release states: "This case includes the following issue: Does a business owner who is not otherwise liable for violent third party criminal conduct on an adjacent parking lot nonetheless have a legal duty to summon aid for a victim of such criminal conduct so that the owner may be liable for negligently failing to summon such aid?"

*Zamos v. Stroud*, Supreme Court case No. S118032

The court will decide if a malicious prosecution claim exists when the underlying suit is filed with probable cause but subsequent developments during the discovery process disclose there is no longer probable cause to support a theory of liability.